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No. 423

IN THE

Supreme Court of the United States

October Term, 1950.

FRANK PALERMO, *Petitioner*,

v.

HONORABLE J. CULLEN GANEY, Judge of the United States District Court for the Eastern District of Pennsylvania.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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JACOB KOSSMAN,
Of Counsel.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Frank Palermo, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on October 30, 1950.

Opinion Below.

The Court of Appeals wrote no opinion in denying the petition for mandamus herein involved (R. 4).

Jurisdiction.

The judgment of the Court of Appeals was entered on October 30, 1950 (R. 4). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 1254(1).[1]

Questions Presented.

1. Whether a paper requiring an individual to appear as a witness before a grand jury on behalf of the United States, in a purported case entitled *United States* v. *Grand Jury*, which neither discloses the names of the persons against whom the inquiry is instituted nor the subject matter of the investigation, is a valid subpoena.

2. Whether mandamus is available to review the denial of a motion to quash and set aside the service of a subpoena alleged to be void.

Constitutional Provision, Statute and Rule of Court Involved.

1. The Fifth Amendment provides, *inter alia*, that—

> No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * *

2. No statute is involved, as R. S. 877 (28 U. S. C. [1946 ed.] 655), set out and discussed below, has been repealed.

3. Rule 17(a) of the Federal Rules of Criminal Procedure provides as follows:

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[1] It may be that the time limit contained in Rules 37 (b) (2) and 45 (a), F. R. Crim. P., is applicable, but in view of the extension of time granted by Mr. Justice Burton on November 20, 1950, allowing petitioner until 30 days from November 29, 1950, within which to file, this petition for certiorari is within even the time allowed by the Federal Rules of Criminal Procedure. Cf. *United States* v. *Smith*, 331 U. S. 469; *Laughlin* v. *Chief Justice*, 325 U. S. 866; *United States ex rel. Coy* v. *United States*, 316 U. S. 342.

Rule 17. Subpoena.

(a) FOR ATTENDANCE OF WITNESSES; FORM; ISSUANCE. A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a commissioner in a proceeding before him, but it need not be under the seal of the court.

Statement.

On September 26, 1950, Frank Palermo, the petitioner herein, was served with a paper entitled "Subpoena to Testify", requiring him to appear before a United States Grand Jury sitting at Philadelphia in the Eastern District of Pennsylvania, as a witness for the United States (R. 1). This paper required him to testify in a purported case entitled *United States* v. *Grand Jury* (R. 3); it did not disclose the name or names of the persons against whom the inquiry was instituted, nor the subject-matter of the investigation (R. 1, 3).

Petitioner did not appear or testify before the Grand Jury (R. 1). Instead, on September 29, 1950, he filed a motion to quash and set aside the service of the purported subpoena (R. 1, 3). The motion set forth the foregoing facts (R. 3), and its allegations were not denied by the United States.

After oral argument and submission of petitioner's brief, District Judge Ganey, respondent herein, denied the motion on October 25, 1950 (R. 1).

Four days thereafter, on October 29, the petitioner filed in the court below an original petition for a writ of mandamus (R. 1-3). This petition recited the foregoing facts, alleged that the purported subpoena was issued in violation of Rule 17(a), F. R. Crim. P. and of the Fourth and

Fifth Amendments, that it was consequently void, and that the District Judge accordingly was under a duty to quash it (R. 1-2). The petition further alleged that the District Judge's action was not remediable through the ordinary course of an appeal, and that there was no other plain, adequate and complete remedy (R. 2); accordingly, it prayed for a rule to show cause why a writ of mandamus should not issue to compel respondent to set aside his order denying petitioner's motion to quash (R. 2-3).

The Court of Appeals denied this petition, without writing an opinion, shortly after it was filed (R. 4).

Reasons for Granting the Writ.

This case shifts the emphasis from "the security of one's privacy against arbitrary intrusion by the police" (*Wolf* v. *Colorado*, 338 U. S. 25, 27) and the problem of "the police acting on their own" (*McDonald* v. *United States*, 335 U. S. 451, 456), to the security of the individual's privacy against being compelled to testify in secret in an unspecified proceeding, and to the problem of prosecutors acting on their own without compliance with even the very nominal requirements laid down by the Rules of Criminal Procedure.

This case, basically, raises the question whether a general warrant to compel testimony stands on a higher plane of legality than a general warrant to search premises. It poses the problem whether a subpoena to testify before a grand jury, where the prospective witness is apprised neither of the identity of the persons or the nature of the subject-matter being investigated, does not in substance and effect destroy the individual's privilege against self-incrimination, since by its very generality such a subpoena precludes any consultation by the witness for his own protection. Specifically, this case presents squarely the question whether, after the repeal of R. S. 877 and since the adoption of Rule 17(a), F. R. Crim. P., a generalized, blind, grand jury witness subpoena purporting to compel testimony in an obviously fictitious proceeding, viz., "*United States* v. *Grand Jury*", constitutes valid process.

I.

A. The conditions imposed by Rule 17(a), F. R. Crim. P., *supra*, p. 3, on the issuance of subpoenas in criminal proceedings are neither onerous nor complex. Such a subpoena shall state "the title, if any, of the proceeding". The Clerk is required to issue sealed blank subpoenas on request of a party, "who shall fill in the blanks before it is served".

If the subpoena is issued in connection with a trial, the title of the proceeding, obviously, is the caption of the case being tried. No such specificity is always possible in grand jury proceedings, but if the names of the persons being investigated cannot be given, at least some indication of the subject-matter of the grand jury's inquiries can be; and in the leading modern case which upheld the right of a grand jury to act as an inquisitorial body on its own volition, it was indicated that the witness should at least be apprised of the names of the parties with respect to whom the witness would be called to testify. See *Hale* v. *Henkel*, 201 U. S. 43, 65, where the Court said:

> We deem it entirely clear that under the practice in this country, at least, the examination of witnesses need not be preceded by a presentment or indictment formally drawn up, but that the grand jury may proceed, either upon their own knowledge or upon the examination of witnesses, to inquire for themselves whether a crime cognizable by the court has been committed; that the result of their investigations may be subsequently embodied in an indictment, and that, in summoning witnesses, it is quite sufficient to apprise them of the names of the parties with respect to whom they will be called to testify, without indicating the nature of the charge against them.

Following *Hale* v. *Henkel*, Circuit Judge Ward quashed a grand jury subpoena which disclosed neither the name or names of the persons against whom the inquiry was instituted nor the subject-matter of the investigation. *In re Shaw*, 172 Fed. 520 (C. C. S. D. N. Y.).

B. Later decisions refused to follow the *Shaw* case. *In re National Window Glass Workers*, 287 Fed. 219 (N. D. Ohio); *In re Black*, 47 F. 2d 542 (C. C. A. 2); *Blair* v. *United States*, 250 U. S. 273 (*semble*, alternative holding). But in each such instance where the general subpoena was upheld, the court relied upon the provisions of R. S. 877. See 287 Fed. at 221; 47 F. 2d at 543-544; 250 U. S. at 280-281. That statute, later 28 U. S. C. (1946 ed.) 655, provided as follows:

> Witnesses who are required to attend any term of a district court on the part of the United States, shall be subpoenaed to attend to testify generally on their behalf, and not to depart the court without leave thereof, or of the district attorney; and under such process they shall appear before the grand or petit jury, or both, as they may be required by the court or district attorney.

But R. S. 877 was specifically repealed in the 1948 revision of Title 28 (see Sec. 39 of the Act of June 25, 1948, 62 Stat. at 992), with the necessary consequence that the cases which rested and relied on that provision fall along with their foundation.

C. It is true that there are indications in the early Committee drafts of the Rules of Criminal Procedure that the *Black* and *Window Glass Workers* cases were deemed to be law (First Preliminary Draft, May 1943, p. 107; Second Preliminary Draft, Feb. 1944, p. 98). But no such indication appears in the Committee's final notes, prepared in March 1945, after the Rules had been adopted by this Court and submitted to the Congress by the Attorney General.

D. In any event, the statutory basis of the later cases has been repealed, and the text of Rule 17(a) is in exact accord with the result reached in *In re Shaw*, 172 Fed. 520, *supra*. It is submitted that the result there reached was sound, and that Judge Ward's opinion has never been overborne in reasoning. He said (172 Fed. at 521-522):

The form used in this district indicates at least a general intention that a witness shall be informed of the matter about which he will be called upon to testify. I think it is proper that he should be. The fifth amendment to the Constitution provides that no one "shall be compelled in any criminal case to be a witness against himself." The Supreme Court has construed this provision largely holding that it is not confined to a criminal case against the witness himself, but extends to any criminal investigation. Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110.

It is quite clear that the ordinary citizen called upon to testify in the strange environment of the grand jury room under the interrogation of the United States attorney will be quite unable to assert his rights, even if he knows what they are. He ought to have an opportunity to consult counsel and be advised of the extent of his right to refuse to testify, and of the way in which to protect himself against giving testimony that might incriminate him.

The United States attorney contends that in this country the grand jury has an inquisitorial power to investigate of its own motion, and that in some instances the utmost secrecy may be necessary to the success of its inquiry, and that the protection of witnesses may safely rest on the presumption that neither the grand jury nor the United States attorney will do anything unfair or oppressive.

It would contribute greatly to the success and celerity of some investigations if the authorities had an unlimited right to search and seize persons, houses, and papers; but the right of the citizen against such proceedings is not left to depend upon any such presumption. He is guaranteed against unreasonable searches and seizures by the fourth amendment to the Constitution. So it would unquestionably speed the detection and conviction of crime to compel suspected persons to testify; but no principle of our law is better settled than that this cannot be done.

* * * * * *

> It is pointed out that the grand jury may often be unable to name any person as connected with the subject that it is investigating of its own inquisitorial power, and, if it cannot subpoena witnesses without naming some person, the inquiry must be altogether abandoned. I think the answer to this is that it can in such a case state in the subpoena the subject of its inquiry and so fix some definition of and limit to the examination to which the witness may be subjected.

Whereupon, over the objection of a most distinguished and conscientious prosecutor, the court quashed the subpoena.

E. Obviously, if it is essential to the validity of a subpoena calling upon a witness to testify in open court, with all the protection which that circumstance affords, that he be apprised of the identity of the person on trial, it is equally important to the validity of a subpoena requiring a witness to testify in secret that he be similarly apprised of the identity of the person whose conduct is being inquired into, or, if the matter cannot thus be specified, then that he be advised of the subject-matter of the inquiry. Otherwise there is being sanctioned a new species of general warrant, which will effectually destroy the privilege against self-incrimination. For, obviously, a person called to testify generally in secret will not know his rights, and will not be able to obtain counsel beforehand as to what they are.

We believe that the general and indefinite subpoena here involved reflects not a mere isolated or inadvertent instance, but is representative of a widespread practice. Consequently, we submit that, insofar as the question may heretofore have been considered by this Court in *Blair* v. *United States*, 250 U. S. 273—and it may well be doubted whether the point was there squarely held—it must now, in view of the repeal of R. S. 877 and the adoption of Rule 17(a), F. R. Crim. P., be reexamined.

Moreover, any proceeding carried on behind closed doors, no matter how worthy the motives by which it is actuated,

is peculiarly susceptible to abuses. Cf. *In re Oliver*, 333 U. S. 257. We therefore urge that review by this Court is imperatively required lest the blind subpoena herein involved acquire through long continued practice a patina of apparent legality.

II.

Since the court below wrote no opinion, it is not possible to know whether it denied the petition for mandamus on the ground that petitioner's substantive rights were not invaded, i. e., that the respondent's order was right, or merely on the ground that his order was not reviewable by mandamus.

It is clear, ever since *Cobbledick* v. *United States*, 309 U. S. 323, resolved the divergence of views in the several circuits, that Judge Ganey's order was not appealable. That conclusion necessarily leads to the inquiry whether the present case is a sufficiently "extraordinary cause" to warrant resort to mandamus. Cf. *Ex parte Fahey*, 332 U. S. 258, 260; *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329, 330 (C. A. 2).

We think it is. Here, clearly, the appeal is not adequate because not available. And in our view the nature of the interest sought to be protected is such that resort to the remedy of mandamus—the only remedy available—should be permitted.

If petitioner were seeking to recover papers of his own wrongfully seized by law enforcement officers, he would be amply protected with procedural devices for the assertion of his rights. Surely his contention that he should not be compelled to endanger his privilege against self-incrimination from the encroachment of process issued as of course at the request of a prosecutor, process which requires him to testify in secret regarding he knows not what, should be entitled to at least equal procedural protection. If petitioner obeyed the subpoena, he would be "powerless to avert the mischief of the order". *Perlman* v. *United*

States, 247 U. S. 7, 13. We think that he was as much entitled to resort to mandamus to correct the District Judge's error as was the woman whose action for breach of contract was erroneously transferred to the equity side of the court. See *In re Simons*, 247 U. S. 231, where the Court, *per* Holmes, J., said:

> If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake.

Mandamus lay there to save a litigant inconvenience and difficulties in a situation where a remedy by way of appeal was available. *A fortiori*, mandamus should lie here to protect rights where the remedy of an appeal is unavailable.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Frederick Bernays Wiener,
Counsel for Petitioner.

Jacob Kossman,
Of Counsel.

November 1950.

FEBRUARY 26, 1951.

Per Curiam Decisions.

No. 423. PALERMO *v.* GANEY, U. S. DISTRICT JUDGE. On petition for writ of certiorari to the United States Court of Appeals for the Third Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The order of the Court of Appeals is vacated and the case is remanded to that court with directions to dismiss the proceeding upon the ground that the cause is moot. *Frederick Bernays Wiener* and *Jacob Kossman* for petitioner. *Solicitor General Perlman* for respondent.

No. 499. Keyes *v.* Sonny Dawson. Appeal from the